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MICHIGAN'S TEACHER CERTIFICATION REQUIREMENT AS APPLIED TO RELIGIOUSLY MOTIVATED HOME SCHOOLS

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Increasing numbers of parents teach their children at home.[1] Many "home schoolers" are fundamentalist Christians or Roman Catholics,[2] often concerned that public schools teach "secular humanism," which they perceive to be anti-religious.[3] Most states have adapted their educational laws to permit home schools.[4] But home-schooling parents in a few states continue to face burdensome certification requirements, such as having to acquire the same credentials as public school teachers. That handful of states includes Michigan. Michigan laws, which impose fines and imprisonment for teaching one's own children without a certificate,[5] are the subject of this Note.

This Note defends the thesis that the teacher-certification requirement of Michigan's compulsory attendance statute is unconstitutional as applied to people who, for sincere religious reasons, believe they must teach their children at home. Michigan courts have incorrectly applied a rational-basis test in regulating religiously motivated home schools, rather than the strict scrutiny required by the U.S. Supreme Court for cases involving both the free exercise of religion and parents' interest in directing their children's education.[6]

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1. Estimates range from over 10,000 to 1,000,000 families. *See* Lines, *Private Education Alternatives and State Regulation*, 12 J.L. & EDUC. 189, 191-92 (1983); Smith & Klicka, *Review of Ohio Law Regarding Home School*, 14 OHIO N.U.L. REV. 301, 302 (1987); *see also* Celis, *Growing Number of Parents Are Opting to Teach at Home*, N.Y. Times, Nov. 22, 1990, at A1, col. 5.

2. Lines, *supra* note 1, at 193.

3. Comment, *Parental Liberties Versus the State's Interest in Education: The Case for Allowing Home Education*, 18 TEX. TECH L. REV. 1261, 1268 (1987) (authored by Michael Knight) [hereinafter Comment, *Parental Liberties*].

4. *See infra* Part III.A.

5. *See* MICH. COMP. LAWS § 380.1599 (1979).

6. For a general discussion of free-exercise cases, *see infra* Parts II.B. & II.C. In April 1990, a sharply divided Supreme Court limited its application of the strict-scrutiny test to cases in which government regulations of the free exercise of religion also invoked "other constitutional protections, such as freedom of speech and of the

Part I of this Note briefly traces the history of education in America, looking at the precursors of today's home schools and compulsory attendance laws. It then examines arguments for and against home schooling. Part II discusses how the U.S. Supreme Court has dealt with challenges to compulsory attendance statutes and with free-exercise challenges in general. Part III summarizes the different approaches that states currently take to home schooling. Part IV examines Michigan's statute and how it has been handled in the courts. Part IV also explains how the first amendment tests mandated by the U.S. Supreme Court should apply to Michigan's statute. Part V suggests ways the statute could be amended to meet the constitutional requirements.

I. BACKGROUND

A. History

Home schooling is not a new idea. Seven American presidents were home schooled: George Washington, John and John Quincy Adams, James Madison, Abraham Lincoln, Woodrow Wilson, and Franklin D. Roosevelt. Other home-schooled leaders include Patrick Henry, Mark Twain, Thomas Edison, Andrew Carnegie, Douglas MacArthur, and Pearl Buck.[7]

Historically, parents had an obligation to educate their children long before compulsory attendance laws existed.[8] For example, the English Poor Laws of the 16th and 17th centuries were designed to teach poor children a trade to help make them productive citizens, and the the Massachusetts Bay Colony's compulsory education law of 1642 also required parents and masters to provide fundamental education to their

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press . . . or the right of parents . . . to direct the education of their children . . . ." Employment Div., Dep't of Human Resources v. Smith, 110 S. Ct. 1595, 1601, 1605-06 (1990) (holding that a Native American unable to obtain unemployment compensation after being fired from his job as a drug counselor for using peyote could not be exempted from a general antidrug law on the ground that his use of peyote was a religious ritual protected by the free-exercise clause of the first amendment). Home schooling would remain subject to strict scrutiny because it involves parental interests in the education of their children.

7. Smith & Klicka, *supra* note 1, at 301-02.

8. *See* Comment, *Parental Liberties, supra* note 3, at 1263-64.

charges.[9] During the 1600s, American parents had the right and obligation to direct their children's intellectual and moral upbringing. This responsibility belonged solely to the parents.[10]

The Massachusetts Bay Colony's compulsory education law of 1642 preceded the nation's first compulsory school attendance law by more than 200 years.[11] State-supported schools began as state assistance to parents in their duty to educate their children. Ironically, those laws have now eroded the common law parental right to educate one's own children.[12]

Thus, ideas about a parent's role in education have changed markedly since the founding of the United States. In establishing free public schools, the states assumed the major role in primary and secondary education. The states do far more in education now than merely provide financial assistance to some parents. Parents today may face an uphill struggle if they want to forego public and private schools. The struggle is especially difficult in states such as Michigan, where regulation presents formidable obstacles.

B. Reasons for Home Schooling

For uncredentialed parents in states such as Michigan, home schooling poses considerable risks—imprisonment, fines,[13] and harassment. These obstacles add to the time commitment and financial sacrifices of teaching one's children

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9. *See* Comment, *Texas Homeschooling: An Unresolved Conflict Between Parents and Educators*, 39 BAYLOR L. REV. 469, 470 (1987) (authored by Gerald B. Lotzer). The 1642 law was aimed at a large number of indentured servants and apprentices, as English laborers sold themselves and their children into service to pay for passage to America. Note, *Home Education v. Compulsory Attendance Laws: Whose Kids Are They Anyway?*, 24 WASHBURN L.J. 274, 276 (1985) (authored by David Allen Peterson) (citing L. KOTIN & W. AIKMAN, LEGAL FOUNDATIONS OF COMPULSORY SCHOOL ATTENDANCE (1980)).

10. *See* Comment, *Home Education in America: Parental Rights Reasserted*, 49 UMKC L. REV. 191, 191 (1981) (authored by E. Alice Law Beshoner) [hereinafter Comment, *Home Education in America*].

11. The first compulsory attendance law was enacted in 1852. *See* Comment, *Missouri Home Education: Free at Last?*, 6 ST. LOUIS U. PUB. L. REV. 355, 355 (1987) (authored by James M. Henderson) [hereinafter Comment, *Missouri Home Education*] (citing L. KOTIN & W. AIKMAN, *supra* note 9, at 25. All states had compulsory attendance laws by the early 1900s. *See* Comment, *Parental Liberties*, *supra* note 3, at 1264.

12. *See* Comment, *Home Education in America*, *supra* note 10, at 192.

13. *See* MICH. COMP. LAWS § 380.1599 (1979).

instead of sending them away to school. Given the persistence of parents who overcome such obstacles and continue to teach their children at home, one would expect home-schooling parents to be highly motivated.

People teach their children at home for a variety of reasons. Some parents are unhappy with the quality of public education.[14] A national commission has reported numerous indications that "the educational foundations of our society are presently being eroded by a rising tide of mediocrity that threatens our very future as a Nation and a people."[15] A study of several thousand home-schooled children showed that they averaged in the seventy-fifth to ninety-fifth percentiles on the Stanford and Iowa Achievement Tests, and that children whose parents were prosecuted for violating compulsory attendance laws averaged in the eightieth percentile.[16] Home-school advocates attribute the success of home schools to the one-on-one instruction that parents give, and to the fact that parents can tailor instruction to each child's needs and abilities. These writers claim that home schools encourage more individual responses and reduce negative socialization pressure. These factors, they say, have fueled the rapid growth of home schools.[17]

In addition, a study of home schooling identified several motivations for home schooling, including the unsuitability of institutional education, a desire to be free of government control, concern for the child's social development, concern about content of education, and personal interest in the child.[18]

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14. *See* Lines, *supra* note 1, at 190. Dissatisfaction with the public schools is not confined to home schoolers. The president of a Michigan manufacturers association has stated that most members of the association find that "high school graduates applying for jobs just don't have the educational skills to do them." Vlasic, *Education Reform is Crucial*, Detroit News, Sept. 27, 1989, at 1C, col. 2. The education establishment itself has criticized the public school system. Lawrence Patrick, president of the Detroit Board of Education, in a recent speech before the Cato Institute, called for reform. *See* Patrick, *Freedom Begins with Choice of Schools*, Detroit News, Nov. 12, 1989, at 19A, col. 1 (excerpts from speech).

15. NATIONAL COMM'N ON EXCELLENCE IN EDUC., A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM, *reprinted in* 129 CONG. REC. 11,189, 11,189 (May 5, 1983); *see also* Smith & Klicka, *supra* note 1, at 302.

16. Smith & Klicka, *supra* note 1, at 302-03. Other studies support the position that home-schooled children do at least as well on standardized tests as students in the public schools. *See id.*

17. *Id.* at 304. The vice-president and the executive director of the Home School Legal Defense Association, J. Michael Smith and Christopher J. Klicka, respectively, take this position.

18. D. Williams, Understanding Home Education: Case Studies of Home Schools

C. Objections to Home Schooling

Objections to home schools generally fit into four groups:[19] First, those concerned about social retardation focus on the inability of the home to provide challenges available in institutional schools. Second, there is concern over a loss of public school money because many school districts' funding depends on enrollment figures. Third, the possibility of instructional inadequacy is a factor.[20] Fourth, critics assert that the interests of parent and child may conflict.[21] One writer suggests that the U.S. Supreme Court ought to find a federal constitutional right to an education.[22] Such a right could then be pitted against the parents' right to free exercise of their religious beliefs.

Professor Ira C. Lupu of the Boston University School of Law sees a virtual Pandora's box of horrors emanating from the home school: "Parents should have substantial power to choose their children's teachers, but there is reason to be troubled when parents choose only themselves."[23] Lupu notes that home schools are "highly likely to be racially exclusionary."[24] He believes that power and influence over children should be divided between parents, on the one hand, and school employees and the community, on the other.[25]

Lupu's concerns, however, pose no constitutional problem to the religiously motivated home schooler. The U.S. Constitution does not guarantee freedom from parental influence, just as it does not guarantee a public education. The Michigan legislature did not mention promoting freedom from parental influence as a purpose of the compulsory attendance law. Until concerns such as freedom from parental influence are

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(April 1984) (paper presented to the American Educational Research Associations available through the E.R.I.C. microfiche system as Document No. ED 244 392); *see also* Comment, *Missouri Home Education*, *supra* note 11, at 356-58.

19. *See* Comment, *Missouri Home Education*, *supra* note 11, at 358-60.

20. *See* Celis, *supra* note 1 (quoting Gene Wilhoit, executive director of the National Association of School Boards).

21. *See, e.g.*, Note, *The Interest of the Child in the Home Education Question:* Wisconsin v. Yoder *Re-examined,* 18 IND. L. REV. 711, 721-22 (1985) (authored by Debra D. McVicker).

22. *See id.*

23. Lupu, *Home Education, Religious Liberty, and the Separation of Powers: A Comment on* Care and Protection of Charles, 72 MASS. L. REV., Sept. 1987, at 55.

24. *Id.*

25. *See id.*

enshrined as compelling state interests or as constitutional rights,[26] they should not trump parents' interests in their children's education or the constitutional right to free exercise of religion.

II. CONSTITUTIONAL LIMITATIONS

This part of the Note examines cases in which the Supreme Court has dealt with challenges, based on either parental interests or the free-exercise clause, to state regulation of education. The U.S. Constitution contains no language that expressly deals with education or parental interests. The first amendment, however, expressly prohibits Congress from abridging the free exercise of religion.[27] The Supreme Court has ruled that the fourteenth amendment similarly restricts the states.[28] The constitutional question in home-schooling cases asks to what extent a state may interfere with the free exercise of religion, when the religious belief includes maintaining a home school.[29] Stated another way, how far may a state go in regulating home schools that are maintained for sincerely held religious reasons? One answer comes from the landmark case, *Wisconsin v. Yoder,*[30] which held that state interests in a child's education must sometimes yield to parents' free-exercise rights.[31]

A. The Education Cases

The Supreme Court articulated general limits on a state's power over education in three cases decided in the 1920s.[32]

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26. At least one prominent scholar and former jurist would not be suprised if some judges "find" such a constitutional right, if doing so would meet their own political agendas. *See generally* R. BORK, THE TEMPTING OF AMERICA (1990).

27. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . . " U.S. CONST. amend. I.

28. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

29. The free-exercise clause has two elements: the freedom to believe (absolute) and the freedom to act (subject to regulation for the protection of society). *Id.* at 303-04.

30. 406 U.S. 205 (1972).

31. *Id.* at 215.

32. *See* Farrington v. Tokushige 273, U.S. 284 (1927); Pierce v. Society of Sisters,

In the first of these, *Meyer v. Nebraska,*[33] the Court held that the fourteenth amendment protected the parents' right to engage a teacher to teach their son to read German.[34] The Court rejected Nebraska's argument that it could regulate education under its "police power" to protect its citizens, to provide for their welfare and progress, and to ensure the good of society.[35]

Although the *Meyer* Court ruled for the parents, it recognized some powers of the state to regulate education: "The power of the State to compel attendance at *some* school and to make reasonable regulations for *all* schools, including a requirement that they shall give instructions in English, is not questioned."[36] But the Court held that the Nebraska statute prohibiting the teaching of foreign languages such as German was arbitrary and without reasonable relation to a legitimate state end. It noted: "No emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed."[37]

Two years later, in *Pierce v. Society of Sisters,*[38] the Court invalidated an Oregon statute requiring parents to send children from ages eight to sixteen to attend a public school.[39] The statute made exceptions for private instruction by a parent or private teacher in "such subjects as are usually taught in the first eight years in the public school."[40] As the Court saw it, the statute could ultimately destroy all private

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268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

33. 262 U.S. 390 (1923).

34. *Meyer*, 262 U.S. at 400.

35. *Id.* at 395. The state argued:

> If it is within the police power of the State to regulate wages, to legislate respecting housing conditions in crowded cities, to prohibit dark rooms in tenement houses, to compel landlords to place windows in their tenements which will enable their tenants to enjoy the sunshine, it is within the police power of the State to compel every resident of Nebraska so to educate his children that the sunshine of American ideals will permeate the life of the future citizens of this Republic.

Id. at 394.

36. *Id.* at 402 (emphasis added).

37. *Id.* at 403.

38. 268 U.S. 510 (1925).

39. *Id.* at 530, 534.

40. *Id.* at 531 n.* (quoting Cumpulsory Education Act, 1923 Or. Laws 9).

primary schools in Oregon, including appellees'.[41] In support of its decision, the Court noted the importance of parents' interests in their child's education: "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[42]

Thus, *Pierce* provided parents not only with the right to prepare their children for the future, but also with the duty to do so. The state's role should be limited to ensuring that parents meet this duty. If parents satisfy their duty to prepare their children for the future, then the state should defer to the parents' judgment.

The 1927 case of *Farrington v. Tokushige*[43] involved territorial regulation of foreign-language schools (mostly Japanese) in Hawaii.[44] Hawaii required teachers to receive a permit from the territorial Department of Public Instruction, which would be issued only to teachers who were prodemocracy and knowledgeable about America.[45] In addition, the schools could be in session only one hour a day, could only teach children after they first attended public school, and could only use department-approved books and curricula.[46] A foreign-language school's permit could be withdrawn if the department decided the school was not qualified.[47]

The Supreme Court in *Tokushige* upheld an injunction prohibiting enforcement of the act, noting that the territory went "far beyond mere regulation of privately-supported schools where children obtain instruction deemed valuable by their parents and which is not obviously in conflict with any public interest."[48] The Court struck down regulations giving "affirmative directions concerning the intimate and essential details" of the schools; entrusting the schools' control to public officers; and denying "owners and patrons reasonable choice and discretion in respect of teachers, curriculum and text-

41. *See id.* at 534.
42. *Id.* at 535.
43. 273 U.S. 284 (1927).
44. *Id.* at 290-91.
45. *Id.* at 293.
46. *Id.* at 294, 296.
47. *Id.* at 295.
48. *Id.* at 298.

books."[49] It concluded that enforcement of the act would probably destroy most, if not all, of the territory's foreign-language schools, and would "deprive parents of fair opportunity to procure for their children instruction which they think important and we cannot say is harmful."[50] Home-schooling parents would likely feel similarly deprived by such expansive state regulation of their schools.

In sum, these three cases clearly establish that states have an interest, albeit not absolute, in the education of children. They also point out that parents have a strong interest in their children's upbringing and that states may not regulate that interest unreasonably. But these cases present only half of the constitutional argument for home schooling—the part involving the state's interest in education and the parents' interest in the upbringing of their child. Many home schools also have the support of a free-exercise-of-religion challenge to state regulation of education.

B. The Free Exercise Cases

The free-exercise clause of the first amendment[51] bars government regulation of religious beliefs;[52] overt, religiously motivated acts, however, may be regulated if they pose "some substantial threat to public safety, peace or order."[53] Examples of religiously motivated conduct not protected by the free-exercise clause include: sidewalk distribution of literature by a minor,[54] refusal to participate in social security,[55] race discrimination,[56] inges-

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49. *Id.*

50. *Id.*

51. "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. CONST. amend. I.

52. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 402 (1963).

53. *Id.* at 403.

54. *See* Prince v. Massachusetts, 321 U.S. 158, 165, 170 (1944) (holding that the state interest in protecting children's welfare includes safeguarding them from abuses and seeing that they receive opportunities to grow into free and independent, well-developed citizens).

55. *See* United States v. Lee, 455 U.S. 252, 258-60 (1982) (explaining that the social security program is a compelling government interest that might not survive widespread religious exemptions).

56. *See* Bob Jones University v. United States, 461 U.S. 574, 604 (1983) (holding that the government interest in eradicating racial bias outweighs the burden imposed

tion of hallucinogenic drugs for sacramental purposes,[57] and polygamy.[58]

Although religiously motivated acts are not completely free from government restrictions, they do receive considerable protection, particularly when accompanied by "other constitutional protections, such as freedom of speech . . . or the right of parents . . . to direct the education of their children. . . ."[59] The Supreme Court has mandated a balancing test where there is such a conflict between religious conduct and state regulation. In *Sherbert v. Verner,*[60] the Court stated that for a state regulation[61] to stand, the regulation either must not infringe appellant's first amendment free-exercise rights, or must be justified by a compelling state interest.[62] In justify-

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on religion by denial of tax exemptions).

57. *See* Employment Div., Dep't of Human Resources v. Smith, 110 S. Ct. 1595, 1605-06 (1990).

58. *See* Cleveland v. United States, 329 U.S. 14, 20 (1946) (finding a Mann Act violation where a Mormon sect still practicing polygamy brought plural wives across state lines, and rejecting the defense that religious belief prompted the action); Reynolds v. United States, 98 U.S. 145, 165 (1878) (rejecting the defense to the federal crime of bigamy that defendant's religious duty as a Mormon required him to be a bigamist, on the grounds that polygamy long has been an offense against society, and that it leads to despotism).

59. *Smith*, 110 S. Ct. at 1601. The limitation of strict scrutiny to instances where free exercise is coupled with another high interest surprised Justice Blackmun. Dissenting in *Smith*, he wrote:

> This Court over the years painstakingly has developed a consistent and exacting standard to test the constitutionality of a state statute that burdens the free exercise of religion. Such a statute may stand only if the law in general, and the State's refusal to allow a religious exemption in particular, are justified by a compelling interest that cannot be served by less restrictive means.
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> Until today, I thought this was a settled and inviolate principle of this Court's First Amendment jurisprudence.

Id. at 1615-16 (Blackmun, J., dissenting) (footnote omitted). Justice O'Connor likewise criticized the majority's position in *Smith*: "In my view, today's holding dramatically departs from well-settled First Amendment jurisprudence . . . and is incompatible with our Nation's fundamental commitment to individual religious liberty." *Id.* at 1606 (O'Connor, J., concurring in the judgment).

60. 374 U.S. 398 (1963).

61. The South Carolina statute barred unemployment benefits for claimants who failed, without good cause, to accept available suitable work. *Id.* at 401. Appellant, a Seventh-day Adventist, was fired for refusing Saturday work, and was unable to find another job that did not require Saturday work. *Id.* at 399. The Employment Security Commission found appellant did not have good cause for not accepting work and thus was ineligible for benefits. *Id.* at 401.

62. *Id.* at 403. The Court found that the commission's ruling forced appellant to choose between following the precepts of her religion and receiving no benefits on the one hand, and abandoning those precepts and getting a job on the other. "Governmen-

ing an incidental burden, the Court said that a rational relationship will not suffice. "[I]n this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.' "[63] Further, it is the state's burden "to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights."[64]

In *Employment Division, Department of Human Resources v. Smith,*[65] the Court upheld a generally applicable criminal law that incidentally burdened a religious practice because the law was not aimed at regulating the religious practice.[66] But the Court noted that the application of "a neutral, generally applicable law to religiously motivated action" has been struck down where the exercise of religion accompanied "other constitutional protections," specifically including "the right of parents . . . to direct the education of their children."[67] It thus remains clear that where the free exercise of religion—accompanied by another "constitutional protection[]"—is infringed directly or indirectly, courts must apply strict scrutiny.

C. Wisconsin v. Yoder

The Supreme Court's most significant ruling relevant to home schooling came in *Wisconsin v. Yoder,*[68] where the Court held that the first and fourteenth amendments prevented Wisconsin from compelling Amish parents to send their children to high school through the age of sixteen.[69] In the Amish tradition, children go to school only through the eighth grade.[70] The parents in *Yoder* feared that sending their children to high school would expose the parents to church

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tal imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship." *Id.* at 404.

63. *Id.* at 406 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

64. *Id.* at 407.

65. 110 S. Ct. 1595 (1990).

66. *Id.* at 1602.

67. *Id.* at 1601.

68. 406 U.S. 205 (1972).

69. *Id.* at 234.

70. *Id.* at 210.

censure and risk both their own and their children's salvation.[71]

The Court noted that Wisconsin's interest in universal education is not immune from the balancing process—especially when it infringes on fundamental rights, such as the free exercise of religion and the traditional interest of parents concerning the religious upbringing of their children.[72] The Court outlined a two-part analysis to determine if Wisconsin could compel Amish parents to send their children to school beyond the eighth grade. The Court asked (1) if the parents' free exercise of religion was being denied or (2) if there was "a state interest of sufficient magnitude" to override the free exercise interest.[73] The Court found that the state action clearly interfered with the parents' first amendment rights.[74] The Court noted that the impact on Amish religious expression was severe: Wisconsin law compelled the parents to violate their religious beliefs.[75] The Court also found that Wisconsin's interest was not "of sufficient magnitude" to override the parents' interests.[76]

Wisconsin made what the Court described as a "sweeping claim"[77] that its interest in universal compulsory education through age sixteen outweighed the parents' interest. Rejecting this claim, the Court said it must "searchingly examine the interests that the State seeks to promote by its requirement for compulsory education to age 16, and the impediment to those objectives that would flow from recogniz-

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71. *Id.* at 209. Testimony showed that the parents believed high school attendance was contrary to the Amish religion and way of life. *Id.* The Amish have a history, dating from the 16th century, of insulating themselves from what they see as a materialistic society. Expert testimony linked the Amish objection to education beyond the eighth grade to their religion. *Id.* at 210. Evidence also showed that the Amish succeed in preparing their children to be productive members of Amish society. *Id.* at 212. The trial court upheld the compulsory attendance statute, and the Wisconsin Circuit Court affirmed. The Wisconsin Supreme Court reversed, holding that the state did not adequately show that its interest in education overrode the parents' free-exercise-of-religion rights. *Id.* at 213. The U.S. Supreme Court affirmed. *Id.* at 227.

72. *Id.* at 214 (citing Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925)).

73. *Id.*

74. *Id.* at 218-19. The Court pointed out that the interest must be rooted in religion, not merely in a personal or philosophical choice, to receive first amendment protection. *Id.* at 215-16.

75. *Id.* at 218.

76. *Id.* at 227.

77. *Id.* at 221.

ing the claimed Amish exemption."[78]

The Court accepted two state interests in compulsory education: preparing children to participate in the political system and enabling them to be economically self-sufficient.[79] The Court stated that the parents' power was subject to state regulation if it appeared that parental decisions would jeopardize the child's well being or have a potential to cause "significant social burdens."[80] Finding evidence to the contrary, the Court barred Wisconsin from enforcing the statute against the Amish parents.[81]

The Court mentioned a number of factors favoring the Amish in *Yoder*. The Amish parents "convincingly demonstrated the sincerity" of the religious beliefs they claimed;[82] the Amish beliefs were deeply related to their way of life. The continued survival of the Amish communities and religious organization depended on their beliefs and daily conduct. Although the state had an interest in enforcing the generally valid statute, the Amish showed the "adequacy of their alternative mode of continuing informal vocational education in terms of precisely those overall interests that the State advances in support of its program of compulsory high school education."[83] The Court suggested that few other religious groups could make a similar showing. It also noted the minimal difference between what the state required (compulsory education to age sixteen) and what the Amish parents already accepted (compulsory education through the eighth grade).[84]

Thus, *Yoder* applies to compulsory attendance laws the formula by which the Court evaluates other free-exercise-of-religion challenges. It requires parents to show that they base their conduct on a sincerely held religious belief and that the state regulation burdens their free exercise of religion. Then the burden shifts to the state to show that it has a compelling interest in the regulation that overrides the parents' religious interest. The state must go beyond "sweeping claims" about its interest and must show "with more particularity" how its

78. *Id.*
79. *Id.*
80. *Id.* at 233-34 (citing Prince v. Massachusetts, 321 U.S. 158 (1944)).
81. *Id.* at 234.
82. *Id.* at 235.
83. *Id.*
84. *Id.* at 236.

interest will be affected adversely by exempting the parents from the regulation.[85]

III. STATUTORY APPROACHES TO HOME SCHOOLING NATIONWIDE

In every state and the District of Columbia, statutes require some form of compulsory school attendance, but a rapidly increasing number of jurisdictions now provide expressly for alternative educational experiences like home schools.[86] Since the early 1980s, the tendency not to require teacher certification in home-schooling situations has grown.[87] This section will describe and analyze how state statutes deal with home schooling.

A. Categories of State Regulations

Generally, states require children to be educated by certified teachers or in an institutional setting, but they also often provide expressly for home schools. As of this writing, forty-three states and the District of Columbia allowed students to fulfill compulsory education requirements outside of formal public schools. For purposes of this discussion, these jurisdictions will be divided between those that do and do not specifically provide for home schooling. Twelve states and the District of Columbia allow what loosely might be termed "equivalent education, however provided." These jurisdictions permit a student to remain absent from public schools as long as the student receives some other equivalent educational

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85. *Id.*

86. Numerous works have surveyed state approaches to home schooling. *See, e.g.*, Lines, *supra* note 1; Smith & Klicka, *supra* note 1; Stocklin-Enright, *Constitutionalism and the Rule of Law: New Hampshire's Home Schooling Quandry*, 8 VT. L. REV. 265 (1983); Stocklin-Enright, *The Constitutionality of Home Education: The Role of the Parent, the State and the Child*, 18 WILLAMETTE L. REV. 563 (1982); Comment, *Parental Liberties*, *supra* note 3; Comment, *The Constitutionality of Home Education Statutes*, 55 UMKC L. REV. 69 (1986) (authored by Kara T. Burgess); Casenote, 16 CUMB. L. REV. 179 (1986) (authored by Kirk Wood).

87. Twenty-four states forbade home schooling without a teaching certificate in 1983. *See* Lines, *supra* note 1, at 227-34 (analyzing statutes published as of January 10, 1983). By late 1990, that number was down to seven. *See infra* notes 103-109 and accompanying text.

experience. Such jurisdictions, with no explicit home-schooling provision, are Alaska,[88] Connecticut,[89] Delaware,[90] Idaho,[91] Illinois,[92] Indiana,[93] Maryland,[94] Massachusetts,[95] New Jersey,[96] New York,[97] North Carolina,[98] Oklahoma,[99] and the District of Columbia.[100]

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88. ALASKA STAT. § 14.30.010(C)(11) (Supp. 1990) (exempting child from compulsory attendance if the child "is equally well-served by an educational experience approved by the school board as serving the child's educational interests despite an absence from school, the request for excuse is made in writing by the child's parents or guardian, and approved by the principal or administrator of the school that the child attends").

89. CONN. GEN. STAT. § 10-184 (1983) (exempting child if parents "show that the child is elsewhere receiving equivalent instruction in the studies taught in the public schools").

90. DEL. CODE ANN. tit. 14, § 2703 (1974 & Supp. 1988) (exempting parents "if it can be shown . . . that a child is elsewhere receiving regular and thorough instruction").

91. IDAHO CODE § 33-202 (1963) (exempting child from compulsory attendance if the child is "comparably instructed, as may be determined by the board of trustees of the school district in which the child resides").

92. ILL. REV. STAT. ch. 122, para. 26-1 (1989) (exempting child from compulsory attendance at public schools if the child attends "a private or a parochial school"). Illinois also recognized home school as a private school. People v. Levisen, 404 Ill. 574, 90 N.E. 213 (1950).

93. IND. CODE. § 20-8.1-3-34 (1976) (providing exception from compulsory attendance if the "child is being provided with instruction equivalent to that given in the public school").

94. MD. EDUC. CODE ANN. § 7-301(a) (1989) (exempting child from compulsory attendance if he "is otherwise receiving regular, thorough instruction during the school year in the studies usually taught in the public schools to children of the same age").

95. MASS. GEN. L. ch. 76, § 1 (1988) (exempting child if "being otherwise instructed in a manner approved in advance by the superintendent or the school committee").

96. N.J. STAT. ANN. § 18A:38-25 (West 1989) (requiring child to attend public or private school or "to receive equivalent instruction elsewhere than at school").

97. N.Y. EDUC. LAW § 3204 (McKinney 1981 & Supp. 1990) ("Instruction may be given only by a competent teacher. . . . Instruction given to a minor elsewhere than at a public school shall be at least substantially equivalent to the instruction given to minors of like age and attainments at the public schools of the city or district where the minor resides."). One court found that a mother who lacked formal training was a competent teacher and thus allowed her to teach her children at home. Her "obvious devotion, love, and effort" showed that her young children were "receiving an extraordinary educational experience which is substantially equivalent to that which they would obtain in the public schools." *In re* Blackwelder, 139 Misc. 2d 776, 781, 528 N.Y.S.2d 759, 763 (N.Y. Sup. Ct. 1988).

98. N.C. GEN. STAT. § 115C-378 (1987) (requiring children to "attend school"). The North Carolina Supreme Court ruled that the statute includes home schooling: "We do not agree that the legislature intended simply by use of the word 'school,' because of some intrinsic meaning invariably attached to the word, to preclude home instruction." Delconte v. State, 313 N.C. 384, 392, 329 S.E.2d 636, 642 (1985).

99. OKLA. STAT. ANN. tit. 70, § 10-105 (West 1989 & Supp. 1991) (excusing compulsory attendance if "other means of education are provided").

100. D.C. CODE ANN. § 31-401 (1988) (exempting child from compulsory attendance if privately given instruction "is deemed equivalent by the Board of Education to the instruction given in the public school").

Thirty-one other states not only allow home schooling by parents who lack teacher certification but also have enacted statutes specifically recognizing home schooling.[101] Many of these statutes were enacted in the 1980s.[102]

Michigan is in the dwindling group of states that require every child who is able-bodied, able-minded, and not geographically isolated to be taught by a certificated teacher or in an institutional setting.[103] Six other states remained in this group as of early 1990: Alabama,[104] California,[105] Iowa,[106] Kansas,[107] Kentucky,[108] and New Hampshire.[109]

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101. These state statutes are as follows: ARIZ. REV. STAT. ANN. § 15-802(B)(1) (1984 & Supp. 1989); ARK. STAT. ANN. §§ 6-15-501 to -507 (1987 & Supp. 1989); COLO. REV. STAT. §§ 22-33-104, -104.5 (1988); FLA. STAT. § 228.041(34) (1987); GA. CODE ANN. § 20-2-690 (1987); HAW. REV. STAT. § 298-9(5) (Supp. 1989); LA. REV. STAT. ANN. §§ 17:236-236.2 (West 1982 & Supp. 1990); ME. REV. STAT. ANN. tit. 20-A, § 5001-A (Supp. 1990); MINN. STAT. ANN. § 120.101 (Supp. 1990); MISS. CODE ANN. § 37-13-91 (Supp. 1989); MO. REV. STAT. § 167.031 (1986); MONT. CODE ANN. § 20-5-102 (1990); NEB. REV. STAT. §§ 79-1701 to -1707 (1987); NEV. REV. STAT. § 392.070 (1987); N.M. STAT. ANN. §§ 22-1-2.1 (Supp. 1990); N.D. CENT. CODE § 15-34.1-03 (Supp. 1989) (temporary amendment effective July 6, 1989 through June 30, 1993); OHIO REV. CODE ANN. § 3321.04 (Anderson 1985); OR. REV. STAT. §§ 339.030(3), .035 (1989); PA. STAT. ANN. tit. 24, §§ 13-1327(d), -1327.1 (Purdon 1986 & Supp. 1990); R.I. GEN. LAWS § 16-19-1 to -10 (1956 & Supp. 1989); S.C. CODE ANN. § 59-65-40 (Law Co-op Supp. 1988); S.D. CODIFIED LAWS ANN. § 13-27-3 (Supp. 1990); TENN. CODE ANN. § 49-6-3050 (1990); TEX. EDUC. CODE ANN. § 21.033(a)(1) (Vernon 1987) (as interpreted by act of May 28, 1989, ch. 658, § 12, 1989 Tex. Sess. Law Serv. 2168); UTAH CODE ANN. § 53A-11-102(1)(b)(ii) (1989 & Supp. 1990); VT. STAT. ANN. tit. 16, § 166b (1989); VA. CODE ANN. § 22.1-254.1 to -257 (1985 & Supp. 1990); WASH. REV. CODE §§ .010(1)(b), 28A.27.010(4) (1989); W. VA. CODE § 18-8-1 (1988 & Supp. 1990); WIS. STAT. § 118.15(4) (1987-88); WYO. STAT. § 21-4-102(b) (1986).

102. *See, e.g.*, ME. REV. STAT. ANN. tit. 20-A, § 5001-A (Supp. 1990); N.D. CENT. CODE § 15-34.1-03 (Supp. 1989) (temporary amendment effective July 6, 1989 through June 30, 1993).

103. *See* MICH. COMP. LAWS §§ 380.1561(1), 380.1561(3)(a), 388.551, 388.553 (1979); *see also infra* Parts IV and V.

104. ALA. CODE § 16-28-3, -5 (1987) (requiring children to go to a public, private or church school or to "be instructed by a competent private tutor" who is required to hold "a certificate issued by the state superintendent of education").

105. CAL. EDUC. CODE § 48224 (West 1978) (exempting children from public and private school attendance if they are tutored by an individual who "hold[s] a valid state credential for the grade taught").

106. IOWA CODE ANN. § 299.1 (West Supp. 1990) ("In lieu of [public school] attendance such child may attend upon equivalent instruction by a licensed teacher elsewhere.").

107. KAN. STAT. ANN. § 72-1111(a) (1985) (requiring attendance at a public or private school "taught by a competent instructor"). A home school taught by an untrained parent did not qualify as such a private school. *In re* Sawyer, 234 Kan. 436, 442, 672 P.2d 1093, 1097 (1983).

108. KY. REV. STAT. ANN. § 159.030 (Michie 1987 & Supp. 1990) (requiring attendance at a public, private, parochial, or church school).

109. N.H. REV. STAT. ANN. § 193:1 (1989) (excusing child from public schools if

B. Features of the Home Schooling Statutes

Although many states adopted home-schooling statutes in the 1980s,[110] the statutes show no obvious uniformity. Approaches to home schooling vary widely, both as to the degree of a home school's accountability to the state and as to the way that accountability is administered.

This section will examine a number of approaches states have taken to protect their interest in securing a quality education for children taught at home. Michigan has addressed a number of these approaches, as will be shown in Parts IV and V. Home-school statutes will be categorized based on the following features: (1) regulations concerning the competence of the teacher; (2) regulations concerning the content of the program; and (3) regulations to measure and assure the student's academic progress.

1. Regulations concerning the competence of the teacher—One approach to regulating teacher competency is to require that the home school's teacher pass key parts of a stipulated proficiency examination. In Arizona, for example, the teacher must master reading, grammar, and mathematics.[111] Arizona does not require proficiency in "how to teach" courses such as those that might be offered in a teachers' college.[112]

Some states require little or no additional accountability if the teacher is certificated.[113] Many states allow the home-school teacher to qualify to teach in a number of ways, including being judged qualified to teach;[114] holding a high school diploma or a general educational development (GED) equivalency diploma;[115] holding a baccalaureate

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attending "an approved private school"). In dictum the New Hampshire Supreme Court found that it is no answer to a charge under this section that a home school provided equivalent supervised instruction by a private tutor. *In re* Davis, 114 N.H. 242, 244, 318 A.2d 151, 152 (1974).

110. *See supra* note 87 and accompanying text.

111. *See* ARIZ. REV. STAT. ANN. § 15-802(B)(1) (1984 & Supp. 1989).

112. This omission gives weight to the unique assets of a home school, where relationships are ongoing and intimate, unlike an institutional setting, where the teacher may have had no opportunity to build a strong, one-on-one relationship with the child, years before formal teaching begins.

113. *See, e.g.*, COLO. REV. STAT. § 22-33-104(2)(i)(1) (1988); FLA. STAT. § 232.02(4)(a) (1989).

114. *See, e.g.*, OHIO REV. CODE ANN. § 3321.04(A)(2) (Anderson 1985); W. VA. CODE § 18-8-1 (1988).

115. *See, e.g.*, GA. CODE ANN. § 20-2-690(c)(3) (1987) (applying provision to

degree;[116] being supervised by a certificated teacher;[117] or being the parent of a child enrolled in an approved correspondence program.[118]

The foregoing list demonstrates that states allowing home schooling are concerned about teacher qualifications. This variety in the ways a home-school teacher can qualify shows that these states believe that teacher certification is not the only way to guarantee teacher competence in a home school. These states also accord value to the relationship between parent and child, an important factor not taken into account by an inflexible requirement that the parent-teacher have a state teaching certificate.

2. Regulations concerning the content of the program—Statutes regulate the content of home-school programs in a number of ways. Some statutes require teaching certain key subjects. Others require that formal schooling take place a minimum number of days per year and a minimum number of hours per day. Many statutes have reporting requirements, and some require periodic outside inspections.

Among curriculum regulations, Arizona's requires teaching in "at least those subjects as reading, grammar, mathematics, social studies and science."[119] Colorado, on the other hand, requires "communication skills of reading, writing, and speaking, mathematics, history, civics, literature, science, and regular courses of instruction in the constitution of the United States."[120] Louisiana requires "a sustained curriculum of quality at least equal to that offered by public schools at the same grade level."[121] A variation on that regulation is Missouri's rule that subjects be "consonant with the pupil's age and ability."[122] Minnesota groups the educational basics into four categories and requires that at least those subject areas be taught.[123]

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parents or guardians only; tutors must hold at least a baccalaureate college degree).

116. *See, e.g.*, MINN. STAT. ANN. § 120.101(7)(5) (West Supp. 1990).

117. *See, e.g.*, N.D. CENT. CODE § 15-34.1-03 (Supp. 1989) (temporary amendment effective July 6, 1989 through June 30, 1993).

118. *See, e.g.*, VA. CODE ANN. § 22.1-254.1(A)(iii) (1985 & Supp. 1989).

119. ARIZ. REV. STAT. ANN. § 15-802(B)(1) (1984 & Supp. 1989).

120. COLO. REV. STAT. § 22-33-104.5(3)(d) (1988).

121. LA. REV. STAT. ANN. § 17:236.1(C)(1) (West Supp. 1990).

122. MO. REV. STAT. § 167.031(2)(2)(b) (1986).

123. *See* MINN. STAT. ANN. § 120.101(6) (West Supp. 1990) (requiring "(1) basic communication skills including reading and writing, literature, and fine arts; (2) mathematics and science; (3) social studies including history, geography, and government; and (4) health and physical education"); *see also* WASH. REV. CODE §

Some states give home-schooling parents considerable freedom in selecting curricula. Mississippi only requires a "simple description of the type of education the . . . child is receiving."[124] Other states are quite specific. Pennsylvania, for example, has a lengthy list of subjects for elementary students and another for the secondary school level, with both lists requiring "safety education, including regular and continuous instruction in the dangers and prevention of fires."[125]

Many states require home schools to mirror public schools in the number of days per year and hours per day in which they give instruction.[126] Colorado, for instance, requires "no less than one hundred seventy-two days of instruction, averaging four instructional contact hours per day."[127] Georgia requires more time but gives greater flexibility; the program must provide, over twelve months, instruction that is "equivalent to 180 school days . . . consisting of at least four and one-half school hours."[128] Again, variety exists as to the degree of flexibility. One state requires "at least one thousand hours of instruction, at least six hundred hours of which will be in" various named core subjects.[129]

Reporting and record keeping are typical features of home-school regulations. These requirements help authorities monitor home schools, and sometimes must be satisfied before the home school may obtain permission to open.[130] They also assure that home-schooling parents are organized, by outlining the different steps involved in putting together an educational program.[131] Furthermore, the reporting can

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28A.27.010(4) (1989) (requiring "occupational education, science, mathematics, language, social studies, history, health, reading, writing, spelling, and the development of an appreciation of art and music").

124. MISS. CODE ANN. § 37-13-91(3)(iii) (Supp. 1989).

125. PA. STAT. ANN. tit. 24, § 13-1327.1(c)(1) (Purdon Supp. 1990).

126. *See, e.g.*, W. VA. CODE § 18-8-1 (1988) (requiring "time equal to the school term of the county").

127. COLO. REV. STAT. § 22-33-104.5(3)(c) (1988).

128. GA. CODE ANN. § 20-2-690(c)(5) (1987).

129. MO. REV. STAT. § 167.031(2)(2)(b) (1986).

130. *See, e.g.*, ARK. STAT. ANN. § 6-15-503(1) (1987) (requiring written notice annually of intent to provide a home school); COLO. REV. STAT. § 22-33-104.5(3)(e) (1988) (requiring annual notice); FLA. STAT. § 232.02(4)(b)(1) (1989) (requiring one-time notice).

131. *See, e.g.*, ARK. STAT. ANN. § 6-15-503(1) (1987) (requiring notice to include the curriculum to be offered, a proposed schedule of instruction, and the qualifications of parent-teachers); MO. REV. STAT. § 167.031(2) (1986) (requiring that the parent maintain records of subjects taught and activities engaged in, samples of the child's

serve as a vehicle for assuring that the other requirements of the program—such as teacher qualification[132] and student progress[133]—are met. With initial reporting provisions, states are able to cut off home schools unlikely to succeed. Periodic reporting requirements allow regular monitoring of home schools. Taken together, these provisions allow states to ensure that the student will be instructed for an adequate amount of time, in at least a basic core of subjects, by a motivated parent who has relevant educational qualifications.

One statute requires home schools to maintain detailed documentation and to make it available to a designated local official if that official has a "reasonable belief that . . . appropriate education may not be occurring."[134] Another statute allows, as a reporting option, a statement from a certified teacher that, "in his professional opinion, the child is being taught in accordance with a sustained curriculum of quality at least equal to that offered by public schools at the same grade level."[135] North Dakota provides that if the home-school teacher is not certificated or has not passed a teacher exam, she is to be supervised by a certificated teacher who "shall spend a minimum average each month of one hour per week in contact with each student" and report directly to the local superintendent.[136]

Many states have passed legislation concerning home schools. They have established procedures for beginning home schools, set curriculum requirements, and set out reporting duties. States typically have some accountability requirement that must be met before a home school can begin operation. If the home school ever falls below required standards,

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academic work, and evaluations of the child's progress, as evidence that child is receiving regular instruction); W. VA. CODE § 18-8-1 (1988) (requiring teacher to "outline a plan of instruction for the ensuing school year").

132. *See, e.g.*, N.D. CENT. CODE § 15-34.1-03 (Supp. 1989) (requiring that the annual statement include "[t]he qualifications of the parent to supervise the home-based instruction") (temporary amendment effective July 6, 1990 through June 30, 1993).

133. *See, e.g.*, ARIZ. REV. STAT. ANN. § 15-802(B)(1) (1984 & Supp. 1989) (requiring a copy of the child's achievement test results each year); PA. STAT. ANN. tit. 24, § 13-1327.1(e)(2) (Purdon Supp. 1990) (requiring the home-school supervisor to "provide and maintain on file" an "annual written evaluation of the student's educational progress as determined by a licensed clinical or school psychologist or a teacher certified by the Commonwealth or by a nonpublic school teacher or administrator").

134. PA. STAT. ANN. tit. 24, § 13-1327.1(h) (Purdon Supp. 1990).

135. LA. REV. STAT. ANN. § 17.236.1(D)(3) (West Supp. 1990).

136. N.D. CENT. CODE § 15-34.1-03 (1981 & Supp. 1989); *see also* WASH. REV. CODE. § 28A.27.010(4)(a) (Supp. 1990) (requiring that a supervising certificated teacher spend a minimum of one hour a week with the pupil and evaluate the pupil's progress).

approval of the school may be rescinded. The bulk of the reporting burden clearly is on the home-schooling parent. It also is evident that states have not created vague or lax regulations. Instead of forcing all home schools to follow the same route to state approval—teacher certification—they have allowed several routes, which may or may not include certification.

3. Regulations to measure and assure the student's academic progress—Most states with home-school statutes, in addition to assuring that proper procedures for operating a school are carried out, want to monitor the student's academic progress. Typically, a state will monitor academic progress by requiring students to take a standardized test from an approved list.[137] Home-school students may have to take such a test annually[138] or less frequently.[139]

As mentioned earlier, home-school students generally perform quite well academically.[140] But the states that allow home schooling have provisions for those students who do not perform adequately.[141] Typically, the parent receives primary responsibility to take remedial action when his child performs unsatisfactorily;[142] then the child is

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137. *See, e.g.*, PA. STAT. ANN. tit. 24, § 13-1327.1(e)(1) (Purdon Supp. 1990) (requiring the supervisor of the home-education program to select a test from a list of at least five established by the department of education); W. VA. CODE § 18-8-1(4) (1988) (requiring a test to be selected by the public school or other person administering the test).

138. *See, e.g.*, ARIZ. REV. STAT. ANN. § 15-802(B)(1) (1984 & Supp. 1989); ARK. STAT. ANN. § 6-15-503(2) (1987 & Supp. 1989).

139. *See, e.g.*, COLO. REV. STAT. § 22-33-104.5(3)(f) (1988) (requiring that the child "shall be evaluated when he reaches the equivalent age for grades three, five, seven, nine, and eleven"); GA. CODE ANN. § 20-2-690(c)(7) (1987) (requiring that the child be tested "at least every three years beginning at the end of the third grade").

140. *See supra* note ? and accompanying text.

141. State provisions defining unsatisfactory performance vary considerably. Even states that rely primarily on standardized test scores differ widely about what percentile rankings should raise alarm. *See, e.g.*, COLO. REV. STAT. § 22-33-104.5(5)(a) (1988) (13th percentile); MINN. STAT. ANN. § 120.101(8)(c) (West Supp. 1990) (30th percentile or one grade level below the performance level for children of the same age); VA. CODE ANN. § 22.1-254.1(C)(i) (1985 & Supp. 1990) (40th percentile). Some states look at other factors, such as reports by a certificated teacher. *See, e.g.*, FLA. STAT. § 232.02(4)(b)(3)(a) (1989). Some states consider the child's individual abilities, not just raw scores, in gauging success. *See, e.g.*, VA. CODE ANN. § 22.1-254.1(C)(ii) (1985 & Supp. 1990) (allowing, as an alternative to testing, an evaluation by which the superintendent determines if "the child is achieving an adequate level of educational growth and progress"); WASH. REV. CODE § 28A.27.310(3) (1989) (allowing an individual assessment to verify that the child is making "reasonable progress consistent with his or her age or stage of development").

142. *See, e.g.*, FLA. STAT.§ 232.02 (1989) (giving parent one year to provide

retested.[143] Ultimately, if the home school is not meeting the child's academic needs, the exemption from compulsory attendance is usually revoked and the child must go to an institutional school.[144] Home schooling may be tried again once the child's academic performance has recovered.[145]

The majority of state legislatures have given careful thought to home schooling as an educational alternative, and have concluded that such schools may proceed without a certificated teacher.[146] Statutes allowing home schooling regulate both the content of a student's program and the competence of the teacher, in order to guarantee that both teacher and student have achieved a certain level of academic skills. Unlike Michigan, these states have satisfied their concern about the quality of a child's education without burdening parents with the requirement that they obtain a state teaching certificate before they instruct their children at home.

IV. THE SITUATION IN MICHIGAN

This part of the Note looks at Michigan's current treatment of home schools, with an emphasis on the requirement of teacher certification. After examining the constitutional, statutory, and regulatory provisions applicable to home schools, it examines how state courts have responded to constitutional challenges. Michigan courts have deviated from the standards established by the U.S. Supreme Court. Properly applied, those standards would overturn Michigan's teacher-certification requirements as an unconstitutional interference with the free exercise of religion and parental rights as manifested in home schools.

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remedial instruction).

143. The time allowed for remedial action varies. *See, e.g., id.* (requiring the pupil to be reevaluated after one year); ARK. STAT. ANN. § 6-15-505(a)(4) (1987) (requiring the student to go to an institutional school unless she retakes the test before the beginning of the new academic year and scores satisfactorily).

144. *See, e.g.*, ARK. STAT. ANN. § 6-15-505(a)(4) (1987).

145. *See, e.g., id.* § 6-15-505(e). The state may impose a statutory minimum for how quickly home schooling may resume. *See, e.g.*, PA. STAT. ANN. tit. 24, § 13-1327.1(m) (Purdon Supp. 1990) (twelve months).

146. *See supra* Part III.A.

A. Constitutional, Statutory, and Regulatory Provisions

Michigan's constitution emphasizes the value of both education and religion. In protecting the free exercise of religion, Michigan's constitution states: "Every person shall be at liberty to worship God according to the dictates of his own conscience."[147] Regarding education, the constitution boldly declares: "Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."[148] It goes on to vest "[l]eadership and general supervision over all public education . . . in a state board of education."[149] It provides that members of the state board be elected, and that the board appoint the superintendent of public instruction and set his term of office.[150]

Michigan's legislature, in three important statutes, stipulated and added to the powers granted by the constitution to the superintendent and to the state board of education. First, the legislature granted the state board of education power to determine requirements for teaching certificates in the public schools.[151] Second, the legislature gave the superintendent of public instruction "supervision of all the private, denominational and parochial schools of this state" in certain prescribed matters.[152] It required also that no one teach in the "regular or elementary grade studies" in any such school without "a certificate such as would qualify him or her to teach in like grades of the public schools of the state."[153] Thus, in effect, the legislature extended the state board of education's regulatory powers to include private as well as public education. Michigan's constitution does not require that extension.

Third, the legislature required every child from ages six to sixteen to attend the public schools.[154] One exception to this rule is attendance at "a state approved nonpublic school, which teaches subjects comparable to those taught in the

147. MICH. CONST. art. I, § 4.
148. *Id.* at art. VIII, § 1.
149. *Id.* § 3.
150. *Id.* It also provides that the superintendent is to head a state department of education, which is to have "powers and duties provided by law." *Id.*
151. MICH. COMP. LAWS § 380.1531(1) (1979).
152. *Id.* § 388.551.
153. *Id.* § 388.553.
154. *Id.* § 380.1561(1).

public schools to children of corresponding age and grade, as determined by the course of study for the public schools of the district within which the nonpublic school is located."[155] A parent who fails to comply with the compulsory attendance provision is guilty of a misdemeanor and may be imprisoned for up to ninety days.[156]

Michigan makes no express statutory provision for home schools. Home schools, however, appear to fit within the statutory definition of private schools.[157] Thus, a parent teaching in the home, according to Michigan law, must meet the same qualifications required of members of the teaching profession. Those qualifications are specified in the regulatory pronouncements of the state board of education.[158]

Teacher-certification regulations, promulgated by the Michigan board of education, are tailored for people trained for a career of teaching in an institutional setting. These requirements may be desirable for one who aspires to teach professionally, but they place a heavy—perhaps prohibitively heavy—burden on parents who wish to teach their own children at home.

Michigan's Teacher Certification Code[159] requires that anyone employed in an elementary or secondary school "with instructional responsibilities" must hold some type of certification.[160] Candidates for a provisional certificate—typically the first certificate held[161]—must present evidence of at least

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155. *Id.* § 380.1561(3)(a). The other exceptions include: a page at the legislature; a child under nine years who does not live within two and a half miles of a public school, unless busing is provided; a child between the ages of 12 and 14 while attending confirmation classes for not more than five months in either of those years; and a child who is enrolled in the public schools but attends up to two hours a week of religious instruction classes during public school hours. *Id.* § 380.1561(3)(b)-(e).

156. *Id.* § 380.1599 (1979).

157. *See id.* § 388.552 (1979):

> A private, denominational or parochial school within the meaning of this act shall be any school other than a public school giving instruction to children below the age of 16 years, in the first 8 grades as provided for the public schools of the state, such school not being under the exclusive supervision and control of the officials having charge of the public schools of the state.

158. *See infra* notes 159-170 and accompanying text. The legislature has mandated a competency floor for persons to whom the state board may issue a certificate. Beginning September 1, 1991, a passing score on examinations covering basic skills and appropriate subject areas will be required. MICH. COMP. LAWS ANN. § 380.1531(2) (West 1988).

159. MICH. ADMIN. CODE r. 390.1101-.1305 (1979 & Supp. 1989).

160. *Id.* r. 390.1105(1) (1979).

161. *Id.* r. 390.1115(2). Other certificates include: a permanent certificate, a life certificate, an occupational education certificate, a continuing certificate, a

forty semester hours "in a program of general or liberal education."[162] The credits must be completed through an approved teacher-education institution or accepted in transfer by such an institution.[163] The candidate must have a bachelor's degree and a recommendation from a Michigan college or university approved for teacher education by the state board.[164]

The candidate also must obtain "satisfactory college credit in directed teaching."[165] Each semester hour of credit in directed teaching requires "a minimum of 30 clock hours of responsible classroom teaching and observation under the supervision of a sponsoring institution."[166] The complete directed-teaching requirement is six semester hours.[167] Thus, the successful candidate must have taught, under supervision in a sponsoring institution, for at least 180 hours.

The regulations do provide that any educational requirement for certification may be satisfied by "evidence of an equivalent as determined by the state board."[168] But because the certificates are geared for public-school teaching positions, the board probably would not adapt its regulations to certify many home-schooling parents who had not attended a very close equivalent to a teachers' college.

Applicants must also request certification within five years of completing the requirements for certification.[169] A continuing certificate may be issued to an applicant who, while holding a provisional certificate, has taught successfully for an employer for three years.[170] Parents who may later decide to teach their children at home are unlikely to seek certification within the specified time period, especially so soon after

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professional education certificate and a temporary or full vocational authorization. *Id.* r. 390.1101 (Supp. 1989).

162. *Id.* r. 390.1122(1) (1979).

163. *Id.* r. 390.1115(2).

164. *Id.* r. 390.1125 (Supp. 1989). A degree from a regionally accredited institution may also be accepted "if it is determined that the degree is equivalent" to that of the Michigan institution sponsoring the candidate. *Id.*

165. *Id.* r. 390.1124(1). The directed-teaching requirement may be waived if the candidate has a master's degree and already has been employed successfully for three years as a teacher (or five years if he lacks a master's degree) and has a recommendation from the school superintendent and the sponsoring institution. *Id.* r. 390.1124(3).

166. *Id.* r. 390.1124(2) (Supp. 1989).

167. *Id.* r. 390.1124(3).

168. *Id.* r. 390.1152 (1979).

169. *Id.* r. 390.1121.

170. *Id.* r. 390.1132(1)(a) (Supp. 1989).

finishing their own education.

Thus, parents wishing to teach at home in Michigan face overwhelming hurdles in earning a teaching certificate. A bachelor's degree from an approved teacher-education college, with at least 180 hours of supervised student teaching, is the primary hurdle. Tuition, materials, and transportation costs loom large. In addition, earning a teaching certificate requires a very substantial time commitment. This would be time away from the very children the parent wishes to educate at home. While a parent is earning a teaching certificate, her children presumably would have to be taught by someone else. Finally, the state's teacher-education system may not even have the resources to provide the training required of home-schooling parents.

Michigan's regulatory structure imposes a heavy burden on a parent who wishes to teach his children at home but has not been educated to be a teacher. For would-be home schoolers whose sincere religious convictions compel that the children be taught at home by the parents, this regulatory burden could lead to a difficult choice: either disobey the law and teach the children at home, or violate one's religious principles by not teaching the children at home. Hiring a tutor who has a teaching certificate would not satisfy a religious duty that requires the parents to do the teaching.

B. Michigan Court Interpretations of the Constitutionality of the Teacher Certification Code

States are free to impose regulatory burdens where appropriate.[171] The question at issue here is whether it is appropriate for Michigan to require religiously motivated home-schooling parents to earn a degree from a teachers' college and spend 180 hours teaching other people's children before being allowed to teach their own children at home. The following cases shed some light on how courts have dealt with Michigan's teacher-certification requirement.

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171. *See, e.g.*, Employment Div., Dep't of Human Resources v. Smith, 110 S. Ct. 1595, 1600 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment)) ("[T]he right of free exercise does not relieve an individual of the obligation to comply with 'a valid and neutral law of general applicability . . . .' ").

1. Hanson v. Cushman: *Home school with no free-exercise challenge*—In *Hanson v. Cushman,*[172] the home-schooling parents urged that they had a fundamental right to control their children's education.[173] They did not raise a free-exercise challenge.[174] The federal district court found that the U.S. Supreme Court precedents did not establish a right to control a child's education.[175] Without a fundamental right at issue, the state's burden was only to show that it acted *reasonably* in requiring compulsory attendance and teacher certification.[176] The court did not apply a strict-scrutiny standard.

Relying on *Wisconsin v. Yoder,*[177] the *Hanson* court noted that the state has a strong interest in education, specifically in preparing young people to participate in the political process and to support themselves financially. The court found that the state advanced this interest by ensuring minimum competency of those entrusted to teach, thus justifying teacher certification.[178] Furthermore, the court concluded, the teacher-certification requirement was appropriate in a home-school setting because of "the difficulty that the state would surely face in examining and supervising, at considerable expense, a host of facilities and individuals, widely scattered, who might undertake to instruct their children at home without certification"; "requiring certification as a standard for competency" is, by comparison, a "less difficult and expensive mechanism" of review.[179] Thus, *Hanson* stands for the proposition that Michigan's teacher-certification requirements are at least rationally related to the state's interests in education. When a free-exercise challenge is added, however, the regulation must face strict scrutiny.[180]

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172. 490 F. Supp. 109 (W.D. Mich. 1980).

173. *Id.* at 112.

174. *Id.* at 114.

175. *Id.* The Supreme Court, however, recently pointed to the importance in free-exercise cases of additional "constitutional protections" that include "the right of parents, acknowledged in *Pierce v. Society of Sisters,* 268 U.S. 510 (1925) . . . to direct the education of their children . . . ." Employment Div., Dep't of Human Resources v. Smith, 110 S. Ct. 1595, 1601 (1990). The Court also cited Wisconsin v. Yoder, 406 U.S. 205 (1972). *Id.*

176. *Hanson,* 490 F. Supp. at 114-15.

177. 406 U.S. 205 (1972).

178. *Hanson,* 490 F. Supp. at 115.

179. *Id.*

180. *See* Employment Div., Dep't of Human Resources v. Smith, 110 S. Ct. 1595,

2. Sheridan Road Baptist Church v. Department of Education: *Church-run private school*—In *Sheridan Road Baptist Church v. Department of Education*,[181] the Michigan Court of Appeals held that the requirement of teacher certification in nonpublic schools did not violate plaintiffs' right to the free exercise of religion.[182] This case involved a church-run school. The court applied an inquiry based on the 1963 U.S. Supreme Court decision of *Sherbert v. Verner*.[183] The inquiry proceeded through three steps: (1) Is plaintiff's belief religious? (2) Does the regulation burden the free exercise of that belief? and (3) Does some compelling state interest justify the burden on the first amendment right?[184]

In *Sheridan Road Baptist Church,* the appeals court found that plaintiffs' belief was indeed religious[185] and was burdened by the teacher-certification requirement,[186] although minimally. It then framed the third step of the inquiry as requiring the court to "searchingly examine" the state's interest and the detrimental effect that exempting the plaintiff might cause.[187] According to this part of the court's opinion, the regulation should be upheld only if alternative, nonintrusive means were not available.[188]

The church schools urged that standardized testing for children would be less intrusive than teacher certification. The court, however, questioned the validity of such tests. The court also stated that testing might occur too late to prevent harm to students' education and might require the state to intrude just as much as with the existing regulation.[189] Then, curiously, the court recharacterized the issue as whether the regulations are "reasonable means" to give effect to a compelling state interest.[190] It found the regulations to

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1601 (1990); Wisconsin v. Yoder, 406 U.S. 205-233 (1972); *see also supra* Parts II.B. & II.C.

181. 132 Mich. App. 1, 348 N.W.2d 263 (1984), *aff'd by an equally divided court,* 426 Mich. 462, 396 N.W.2d 373 (1986), *cert. denied*, 481 U.S. 1050 (1987).

182. *Id.* at 22, 348 N.W.2d at 274.

183. 374 U.S. 398 (1963).

184. *See Sheridan Rd. Baptist Church*, 132 Mich. App. at 10, 348 N.W.2d. at 269 (citing Sherbert v. Verner, 374 U.S. 398, 406 (1963)).

185. *Id.* at 11, 348 N.W.2d at 269.

186. *Id.* at 11, 348 N.W.2d at 270.

187. *Id.* at 13, 348 N.W.2d at 270.

188. *See id.*

189. *Id.* at 19, 348 N.W.2d at 273.

190. *Id.* at 22, 348 N.W.2d at 274.

be a reasonable exercise of state authority[191] and held the teacher-certification requirement constitutional as applied in the case.[192] This reasonable-basis inquiry conflicts with the strict scrutiny accorded other religious rights.[193]

3. People v. DeJonge: *Home school with free-exercise challenge*—In *People v. DeJonge,*[194] defendants were convicted of violating Michigan's compulsory attendance law by teaching their children at home without certification.[195] The DeJonges'-pastor testified that the Grand Valley Orthodox Christian Reformed Church, of which they are members, teaches that God gives parents the responsibility for educating their children, but that parents may delegate that responsibility.[196] The children's mother, Chris DeJonge, who did the teaching, agreed with the pastor.[197] However, the father, Mark DeJonge, testified that he believed it to be "a sin to submit to state authority and to employ certificated teachers."[198] The court of appeals found the burden on Chris DeJonge from state regulation to be minimal because "[h]er religious belief does not prohibit her from hiring certificated teachers."[199] It found the burden on Mark DeJonge to be greater, however, and observed that "there appears to be no room for compromise."[200] It then pointed out that DeJonge's freedom to act on his belief is not absolute, and that "[h]is conduct remains subject to regulation for the protection of societal interests."[201]

The court also determined that Michigan's certification requirement "is the least obtrusive means of achieving the state's interest."[202] It stated that "[i]n arguing to the contrary, the DeJonges have not proposed an alternative. Their

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191. *Id.*
192. *Id.* at 27-28, 348 N.W.2d at 277.
193. *See supra* notes 59-67 and accompanying text.
194. 179 Mich. App. 225, 449 N.W.2d 899 (1989) (on rehearing). The Supreme Court of Michigan, "in lieu of granting leave to appeal," remanded "the case to the Court of Appeals for reconsideration in light of Department of Social Services v. Emmanual Baptist Church, 434 Mich[.] 380 [, 455 N.W.2d 1 (1990)] and decisions of the United States Supreme Court since the issuance of the Court of Appeals decision in this case." People v. DeJonge, Nos. 87978, 87979, 1990 Mich. LEXIS 2787 (to be reported at 461 N.W.2d 365) (Mich. Oct. 17, 1990).
195. *DeJonge,* 179 Mich. App. at 228, 449 N.W.2d at 900.
196. *Id.* at 228-29, 449 N.W.2d at 901.
197. *Id.* at 229, 449 N.W.2d at 901.
198. *Id.* at 234, 449 N.W.2d at 903.
199. *Id.* at 235, 449 N.W.2d at 903.
200. *Id.*
201. *Id.*, 449 N.W.2d at 903-04.
202. *Id.* at 236, 449 N.W.2d at 904.

position is based solely on the assertion that most other states do not require certificated teachers in home schools."[203]

The court then went on to express its opinion that curriculum and attendance requirements alone are not enough to meet the state's interest in education. Such requirements, it said:

> ensure that the student and the educational material are in the same place at the same time. However, they do nothing to ensure that the material is imparted to the child in such a way as to be understandable. Alone, they are unlikely to stimulate intellectual curiosity and inquiry or to cause that fascinating conjunction of superficially incompatible facts that is creative thought.[204]

Thus, the Michigan Court of Appeals quickly dismissed the means by which more than forty states handle home schools.[205]

C. Application of Supreme Court Tests

Michigan courts have yet to apply correctly the Supreme Court's tests to a free-exercise challenge of the teacher-certification requirement. The proper application of the U.S. Supreme Court's strict-scrutiny and least-restrictive-means tests suggests Michigan's teacher-certification requirement, as applied to parents who want to teach their children at home for religious reasons, is unconstitutional. In *Sheridan Road Baptist Church,* the appeals court slipped into a rational-basis standard, rather than a strict-scrutiny standard.[206] An

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203. *Id.* at 236-37, 449 N.W.2d at 904.

204. *Id.* at 237, 449 N.W.2d at 904.

205. *See supra* Part III.A.

206. *See supra* Part III.B.2. In the aftermath of Employment Div., Dep't of Human Resources v. Smith, 110 S. Ct. 1595 (1989), it is unclear whether the U.S. Supreme Court would mandate the balancing test from Sherbert v. Verner, 374 U.S. 398 (1963): "We have never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation." 110 S. Ct. at 1602. The State of Michigan, in its brief and oral argument in the Michigan Supreme Court, acknowledged that the *Sherbert* standards should apply to a free-exercise challenge of the teacher-certification law. *See* Sheridan Rd. Baptist Church v. Department of Educ., 426 Mich. 462, 555, 396 N.W.2d 373, 416 (Riley, J., dissenting). But even if the *Sherbert* version of strict scrutiny (least restrictive means to achieve a compelling state interest) were not applicable, the *Smith* Court

evenly divided Michigan Supreme Court upheld the decision,[207] but a three-justice dissenting opinion in *Sheridan Road Baptist Church* by now Chief Justice Riley pointed out the faulty analysis.[208]

Similarly, the appeals court in *DeJonge* appeared to place the burden of proof on the wrong party in dealing with the question of whether the state has other, less intrusive means available to it to regulate home schools.[209] In *Wisconsin v. Yoder,*[210] the U.S. Supreme Court placed the burden on the state to show that its interest overrode that of the parents.[211]

As discussed earlier, *Wisconsin v. Yoder* establishes the procedure for inquiry in a free-exercise challenge to a state education statute.[212] First, parents must show that their conduct stems from a sincerely held religious belief. Second, they must show that the regulation burdens, directly or indirectly, their exercise of religion. The burden of proof then shifts to the state, which must show it has a compelling interest in the regulated activity. Finally, the state must show "with more particularity" how its interest would be adversely affected by exempting the home school. Under *Sherbert v. Verner,*[213] the state must show that there is no less intrusive means by which it may attain its interest.

In a religiously motivated home-schooling situation, the parents sincerely believe it is their duty to teach their children. Home-schooling parents are burdened by Michigan regulations: many do not hold a teacher's certificate and certificates cannot be obtained either quickly or cheaply. Gaining admittance to a teachers' college, paying tuition, attending classes, and student teaching are all extremely demanding requirements to be met before a parent may teach his child at home. The time required to fulfill these requirements might be enough of a burden to defeat the very purpose

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reaffirmed *Yoder*. *See Smith*, 110 S. Ct. at 1601 n.1.

207. 426 Mich. 462 (1986).

208. *Id.* at 555 (Riley, J., dissenting) (arguing that the plurality of supreme court justices and the appeals court relied on "misapplication of the applicable standard of review").

209. *See* People v. DeJonge, 179 Mich. App. 225, 236-37, 449 N.W.2d 899, 904 (1989) ("[T]he DeJonges have not proposed an alternative.").

210. 406 U.S. 205 (1972).

211. *See supra* Part II.C.

212. *See supra* note 85 and accompanying text.

213. 374 U.S. 398 (1963); *see also supra* note 60 and accompanying text. The applicability of this test is now unclear in view of Employment Div., Dep't of Human Resources, 110 S. Ct. 1595 (1990). *See supra* note 206.

of the parents; often someone else will have to teach his children while a parent is away from home earning a teaching certificate. Where the religious requirement is that the parents themselves do the teaching, it is no solution to hire someone who is certificated and who shares the parents' religion. Thus, the parents in this situation have clearly shown that the state regulation burdens their sincerely held religious belief, and the burden now shifts to the state.

The state has no problem showing it has a compelling interest in the education of the children. The need to educate children so that they may become citizens who are prepared to participate in the political system and who can support themselves economically is a compelling state interest.[214]

The first three steps of the process outlined in *Yoder* do not pose any problems in the Michigan cases, where the parents have sincere religious motivations for home schooling that would be impaired directly by the state, but the state itself also has a compelling interest in education. The issue, under *Yoder*, boils down to whether the state can show "with more particularity" how its interest will be affected adversely by exempting the home school from the teacher-certification requirement. Under *Sherbert,* the question becomes whether a less intrusive means exists for the state to attain its interest in the education of children. The burden of persuasion at this point rests on the state. Michigan must show that its interest in education is more compelling than that of most other states, or that most other states erred in their procedures that allow for home schools. It is significant that home-school statutes in other states have already been enacted; they are not mere proposals of home-school advocates.

In finding that teacher certification is the least restrictive means of furthering the state's interest in education, the Michigan Court of Appeals attacked standardized tests, used by a large number of states to monitor home schools,[215] as an ineffective guarantee of home-school success.[216] The court's analysis proceeded as follows: (1) it is unclear that standardized tests measure validly a student's academic progress; (2) even if a valid test existed and could be administered, there is the danger that a year of the child's education

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214. Wisconsin v. Yoder, 406 U.S. 205, 221 (1972); *see also supra* notes 62-63 and accompanying text.

215. *See supra* notes 137-139 and accompanying text.

216. *See* Sheridan Rd. Baptist Church v. Department of Educ., 132 Mich. App. 1, 19, 348 N.W.2d 263, 273, *aff'd by an equally divided court,* 426 Mich. 462, 396 N.W.2d 273 (1986), *cert denied*, 481 U.S. 1050 (1987).

could be wasted before any shortcomings were detected; and (3) the very administration of such tests would intrude on the home school about as much as the teacher-certification requirement does.[217]

Each of these arguments against the use of standardized tests to monitor home schools is fatally flawed. The first frontally assaults the concept of standardized tests, yet Michigan itself relies heavily on such tests. Its colleges and professional schools use standardized tests in their admission decisions.[218] Tests also are used to license activities ranging from the practice of medicine to selling insurance and driving a motor vehicle.[219] Standardized tests are given to public school children in Michigan each year.[220] Moreover, many other states use standardized tests to measure a home-schooled child's academic progress.[221] Some states consider at least five tests to be valid, and allow parents to choose any of them.[222] If a single examination used by Michigan or any other state passed the validity test, that examination could be identified as one that could help Michigan meet its interest in education, and the argument for teacher certification in home schools would fail.

The appeals court's second argument also fails. In *Sheridan Road Baptist Church v. Department of Education,*[223] the court of appeals was troubled by the assumption that any standardized test would be given after the home school had existed for a while, perhaps as long as a year.[224] If the school did not educate adequately, the test would not point

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217. *See id.*

218. *See, e.g.,* U. MICH. BULL. Apr. 26, 1989 (Law School Announcement 1990-91), at 91.

219. *See* MICH. COMP. LAWS § 333.16177 (1979); Mich. Admin. Code r. 338.2314 (Supp. 1989) (requiring a national licensing exam for physicians practicing in Michigan); MICH. COMP. LAWS ANN. § 500.1204 (West 1983 & Supp. 1990) (requiring a written examination for insurance agents licensed in Michigan); MICH. COMP. LAWS ANN. § 257.309 (West 1977 & Supp. 1990) (requiring an examination for drivers licensed in Michigan).

220. A groundbreaking new state reading test, developed during five years of research by the Michigan Department of Education, working with the Michigan Reading Association, was approved for 330,000 pupils. The Michigan Educational Assessment Program test also included a math test. *See* Russell, *Reading Skills Are Put to Test*, Detroit News, Sept. 19, 1989, at 1A, col. 6.

221. *See supra* notes 137-139 and accompanying text.

222. *See, e.g.,* PA. STAT. ANN. tit. 24, § 13-1327.1(e)(1) (Purdon Supp. 1989) (requiring the home-education program supervisor to select a test from a list of at least five established by department of education).

223. 132 Mich. App. 1, 348 N.W.2d 263 (1984), *aff'd by an equally divided court,* 426 Mich. 462, 396 N.W.2d 373 (1986), *cert. denied*, 481 U.S. 1050 (1987).

224. *Id.* at 19, 348 N.W.2d at 273.

that out until after the fact. Thus, a year or so of the child's life would have been squandered. The U.S. Supreme Court, however, allows curtailment of the free exercise of religion only for the "gravest abuses."[225] It is hardly a grave abuse for a well-meaning parent to keep a child out of public schools for a year.

In addition, the state has means other than teacher certification available to it to ensure that the home school gets off to a good start. It can require the parent who does the teaching to have academic credentials that are not as geared toward teaching professionally in an institutional setting. It can require supervision by a certificated teacher. Michigan could require the parent to obtain approval before beginning the home school, and in the application require that a number of factors be addressed satisfactorily, such as the specifics of what will be taught in the home school and a schedule of when the teaching will occur. Thus, the state could exercise considerable control over the home school and eliminate the likelihood of "grave abuses." These regulations could adequately protect the state's interest until a valid standardized test could be administered.

The court of appeal's final argument is similarly unsatisfactory. The court in *Sheridan Road Baptist Church* expressed concern that other regulations would be as intrusive as certification.[226] The certification requirement, however, is not merely intrusive; where the parents have no professional teaching background, the certification requirement effectively prohibits home schooling. No other requirement could be as intrusive as one that stops the home school from operating until the parent spends what could be years obtaining teacher certification. Standardized testing may be bothersome; reporting may be time-consuming and onerous; but neither is as intrusive as the requirement of earning a four-year teacher's degree before beginning home schooling. An obvious solution to the court's intrusiveness quandary would be to allow certification as one option, and various reporting and standardized-test requirements as another. This would allow parents to choose the option they consider less intrusive.[227]

The state might argue that the various alternatives to certification requirements are too costly for the state to administer. But in home schools, parents could bear virtually

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225. *See supra* note 63 and accompanying text.
226. 132 Mich. App. at 22, 348 N.W.2d at 275.
227. This solution has been pointed out before. *See* Mangrum, *Family Rights and Cumpulsory School Laws*, 21, CREIGHTON L. REV. 1019, 1044 (1987-88).

all of the marginal costs of teaching the child at home rather than in the public schools. For example, a fee could be imposed for the privilege of having a home school. That fee could cover the costs of paperwork, standardized tests, and whatever supervision the state might give.[228]

Thus, it is clear that viable alternatives to certification exist whereby Michigan could protect its interest in education. Under *Sherbert,* where a regulation burdens the free exercise of religion, the mere existence of less intrusive alternatives is enough to warrant an exemption. A "searching examination" of Michigan's interest in education shows that exempting religiously motivated home schools from the teacher-certification requirement would not seriously interfere with the state's interest. Therefore, under *Yoder,* Michigan's teacher-certification requirement should be ruled unconstitutional as applied to parents who teach their children at home for religious reasons.[229]

V. CONCLUSION

The U.S. Supreme Court mandates strict scrutiny for regulations that burden the free exercise of religion coupled with parental interests. The state must show that it has a compelling interest to protect. Its regulation then must pass a searching examination or be the least restrictive way in which the state can protect its interest. If the state fails to make these showings, it must exempt the activity from the regulation.

Michigan is one of only seven states that require either attendance at an institutional school or instruction by a certificated teacher. Forty-three states and the District of Columbia allow home schooling by a teacher who has not been certificated. These jurisdictions have many different approaches to protect their interest in education, including

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228. If such a fee system were structured to burden home schools minimally, it would not unconstitutionally infringe the parents' free-exercise rights. States are allowed to meet their compelling interests, even in the face of free-exercise rights, by a means that passes a searching examination, *see* Wisconsin v. Yoder, 406 U.S. 205, 221 (1972), or by the least restrictive means available, *see* Sherbert v. Verner, 374 U.S. 398, 407 (1963).

229. *Yoder*'s use of strict scrutiny survives the recent decision of *Employment Division, Department of Human Resources v. Smith* because the Court explicitly stated that strict scrutiny still applies when free-exercise rights are paired with parental interests. *See supra* note 6 and accompanying text.

demonstrating teacher competence in ways tailored to the home-school setting, complying with various curriculum and reporting requirements, and having the student tested periodically. Where the home school fails to meet statutory standards, the laws generally provide that the child must be educated in an institutional setting.

Michigan's court of appeals has not correctly applied the tests required by the U.S. Supreme Court. Proper application of the tests to home schools established for religious reasons would require that such home schools be exempted from the teacher-certification requirement. Such an outcome is assured because Michigan can protect its interest in education without requiring that home-schooling parents be certificated as public school teachers. The arguments on which Michigan has relied to require teacher certification do not hold up in the bright light of strict scrutiny under which the Supreme Court mandates that they be examined.[230]

Michigan prides itself as being a pace-setter in the field of education. The time is ripe for the state to decriminalize home schooling by sincere and competent parents who lack teacher certification and the resources to obtain it.

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230. Although Michigan clearly must exempt religiously motivated home schoolers from its teacher-certification requirement, the question remains of what to do with those who home school for other than religious reasons. There is no obvious constitutional argument that Michigan must exempt them as well. Thus, dealing with secularly motivated home schoolers appears to be within the state's legislative discretion.

It is doubtful, however, that secular home schoolers are more of a threat to the state's interests than are religious home schoolers. A strong argument could be made, in fact, that secular home schoolers are highly deserving of exemption, because their reasons are likely to center around a quest for academic excellence. It is a questionable public policy that would attempt to frustrate such goals.

A more sensitive and productive approach to home schooling would be for Michigan to exempt from teacher-certification requirements all home schools that comply with regulations tailored for parent-teaching-child situations. It simply makes sense to take into account the unique educational opportunities that a parent has with his own children. Most states already do.